Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of the Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures	RM-11293

REPLY OF THE EDISON ELECTRIC INSTITUTE to the PETITION OF THE UNITED STATES TELECOM ASSOCIATION

Pursuant to Section 1.405(a) of the Commission's Rules, the Edison Electric Institute hereby opposes the Petition for Rulemaking filed by the United States Telecom Association (USTA) in the above-referenced proceeding.[1] The Petition is unsupported in law, fact or policy, and should be dismissed or denied without further Commission action. Section 224 of the Communications Act[2] clearly excludes incumbent local exchange carriers (ILECs) as telecommunications carriers for all purposes related to pole attachment regulation. In addition, it is contrary to clear Congressional intent and is unsupported by precedent.

I. Introduction

The Edison Electric Institute (EEI) is the association of the United States investor-owned electric utilities and industry associates worldwide. EEI's U.S. members serve almost 95 percent of all customers served by the shareholder segment of the U.S.

[1] Petition for Rulemaking of The United States Telecom Association in RM-11293 (filed Oct. 11, 2005) (hereinafter "Petition").
[2] 47 U.S.C. § 224 (the "Pole Attachment Act").

industry, about 70 percent of all electricity customers in the U.S., and generate about 70 percent of the electricity delivered in the nation. It frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction. Therefore, EEI is an interested party opposing the USTA Petition.

II. Section 224 Excludes ILEC Pole Attachments From FCC Jurisdiction

USTA is asking the FCC to do what it cannot: give ILECs a benefit – the CLEC pole attachment rate – that Congress had explicitly denied to ILECs. That denial was based on ILECs owning poles, the basis for their being included in the definition of a "utility".[3] Nothing has changed since passage of the 1996 Telecommunication Act — neither the Act, nor the fact that ILECs are pole-owning utilities under the Act.

USTA bases the core of its argument[4] on the fact there are two terms used in the Pole Attachment Act: "telecommunications carrier" and "provider of telecommunications service". This argument, however, fails to fully reflect all of the relevant definitions of the Telecommunications Act.[5] In light of those definitions, it is clear that attachments by ILECs are simply not jurisdictional under the Pole Attachment Act, because they are not "pole attachments" as defined by the Act.

The FCC has jurisdiction over "pole attachments."[6] "Pole attachments" is a defined term including any attachment by a "provider of telecommunications service."[7]

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[3] 47 U.S.C. § 224(a)(1).
[4] Petition at pp.7-8.
[5] *See* 47 U.S.C. § 153.
[6] 47 U.S.C. § 224(b).
[7] 47 U.S.C. § 224(a)(4).

ILECs are, as USTA itself explicitly states,[8] "providers of telecommunications service."[9] All such providers are "telecommunications carriers."[10] This means that ILECs must be, under that general definition, telecommunications carriers. Yet all such carriers, *for any purpose under the Pole Attachment Act (Section 224)*, explicitly do not include ILECs.[11]

Thus, since ILECs cannot be considered carriers under Section 224, and all carriers are providers under Section 153, ILECs also must not be considered as providers of telecommunications services for any purpose under Section 224. As a result of the logical structure of the Telecommunications Act as a whole, ILECs cannot own pole attachments as defined under the Pole Attachment Act. Therefore, their attachments simply are not under the "pole attachment" jurisdiction of the Commission.[12]

III. The Congressional Policy Expressed in the Pole Attachment Act Also Prevents FCC Regulation of ILEC Pole Attachments

The above result, which follows from the logic of the Act's construction, is also supported by the underlying policy of the Pole Attachment Act. USTA argues[13] that "there simply is no justifiable policy reason for allowing utilities to charge ILECs more than they charge CLECs for the use of the same space on and access to poles." Quite to

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[8] Text associated with Petition n.17, pp.6-7.

[9] *See* 47 U.S.C. § 153 (16, 26, 43, 47, 48, 52).

[10] 47 U.S.C. § 153(44); *see* 47 U.S.C. § 224(e)(1), mandating that "t[h]e Commission shall … prescribe regulations … to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services," using both "carriers" and "provide[rs]" in a context clearly demonstrating that Congress considered them essentially equivalent and interchangeable.

[11] 47 U.S.C. §§ 224(a)(5) and 251(h).

[12] This logic can be restated more formalistically as:

The FCC has jurisdiction over "pole attachments," where pole attachments include attachments by "providers," and all ILECs are "providers" and all "providers" are "carriers", but no "carrier" (for 224) is an ILEC; therefore no "provider" (for 224) is an ILEC, and thus ILEC attachments are not "pole attachments," such that the FCC has no jurisdiction over ILEC attachments	**OR:**	FCC >*j* "pole attachments," pole attachments > "provider" attachments ILECs < "providers" < "carriers" but "carriers"(*224*) /> ILECs; therefore "providers"(*224*) /> ILECs, and ILEC attachments /= "pole attachments" and FCC />*j* ILEC attachments

[13] Petition at p.15.

the contrary, however, Congress specifically and explicitly required exactly just that very policy,[14] as long ago recognized by the FCC[15] (and cited again here even by USTA[16]).

The policy determination made by Congress is as follows. Pole owners are utilities and do not need protection under the Act. Instead, utilities are subject to the obligations the Act imposes upon pole owners. ILECs are utilities because they are pole owners. Thus, ILECs are subject to the requirements imposed on pole owners, and do not need the protections (or benefits, such as formula attachment rates) available to newly entrant, non-pole-owning telecommunications providers or carriers.[17]

IV. The Congressional Policy Expressed in the Pole Attachment Act Also Prevents FCC Regulation of ILEC Pole Attachments

NCTA v. Gulf Power[18] also does not support USTA's argument that the FCC has plenary jurisdiction over all pole attachment rates. In fact, contrary to the assertion by USTA,[19] the Supreme Court did not "f[i]nd that Section 224(b)(1) gives the Commission a 'general mandate to set just and reasonable rates.'" Instead, rather, the Court simply pointed out[20] that "the Court of Appeals [below had] concluded without analysis that [certain subsections of the Act] 'narrow (b)(1)'s general mandate to set just and

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[14] 47 U.S.C. § 224(a)(5).
[15] *Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, 11 FCC Rcd. 9541, 9543 ¶6 (1996); *Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, Report and Order, CS Docket 95-171, 13 FCC Rcd. 6777, 6781 ¶5 (1998) ("an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC *has no rights under Section 224* with respect to the poles of other utilities"), *also citing* Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113.
[16] Petition at n.26, p.10.
[17] *See id.*
[18] *National Cable & Telecomm Ass'n, Inc. v. Gulf Power Co., et. al.*, 534 U.S. 327, 151 L.Ed.2d 794, 122 S.C.Rep. 782 (2002)
[19] Petition at pp. 15-16, erroneously citing 534 U.S. 334.
[20] 534 U.S. 335.

reasonable rates'[21]." The Supreme Court then rejected the ensuing rationale that the lower court had derived from that court's own preceding summary conclusion.

This is not a "finding" by the Supreme Court in agreement with the lower court's observation. In fact, the Court does not mention it further. Moreover, by highlighting the lack of analysis, the actual statement by the Supreme Court could well be seen as an implicit criticism of the lower court and its almost off-hand comment. Ultimately, the *NCTA* decision, on this point, merely stands for the proposition that the FCC's "theoretical" jurisdiction over pole attachment transactions is in some indefinite way broader than the "sum" of the coverage addressed by the cable and CLEC attachment rate formulas.[22] Further, since those issues were not before it, the Court did not fully address even the full scope of the formula-rate jurisdiction, much less the broader "theoretical" jurisdiction.

V. Conclusion

The USTA Petition in this proceeding is contrary to the statute, Congressional intent shown in unambiguous legislative history, and Commission and judicial precedent. The response of EEI refutes USTA's unsupported and misleading allegations of fact and erroneous assertions of law. There is no ambiguity: the statute clearly excludes ILECs from all parts of Section 224, including regulated rates, terms and conditions.

Congress gave CLECs pole attachment rights in order to promote telephony competition with ILECs. Extending any of those rights to ILECs would violate this overriding purpose of the 1996 amendments. As the Commission has long recognized, it is not for the Commission to decide whether Congress was fair in denying certain

[21] Citation omitted.
[22] 534 U.S. 336.

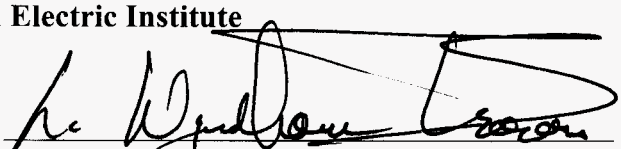
benefits, or whether Congress was implementing bad public policy thereby. Instead, the Commission may only apply the express language of the statute.

Thus, the Commission must continue to exclude ILECs entirely from any pole attachment rights under Section 224. USTA can only seek such relief from Congress. Therefore, Commission must dismiss the Petition without further consideration.

WHEREFORE, THE PREMISES CONSIDERED, EEI opposes the USTA Petition, and urges the Commission to dismiss or deny it without further consideration.

Respectfully submitted,

Edison Electric Institute

By: 

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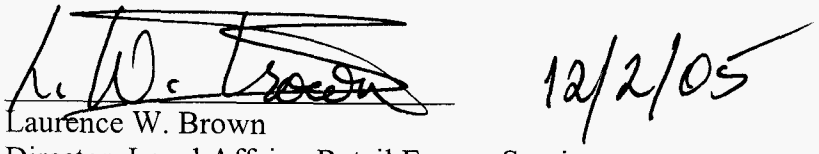
December 2, 2005

Proof of Service

I have this day served upon James W. Olson, Vice President, Law, and General Counsel, of the United States Telecom Association (607 14th St., NW, Washington, DC 20005) the Reply of the Edison Electric Institute in this proceeding (RM-11293), by First Class mail, as required by the Commission's Rules of Procedure (*see* 47 C.F.R. § 1.405).



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